No. 981.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

In Admiralty.

PAAUHAU SUGAR PLANTATION COMPANY, (A CORPORATION),
Appellant,

vs.

SAMUEL PALAPALA,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

ARGUMENT AND BRIEF FOR APPELLANT, FILED PURSUANT TO STIPULATION BETWEEN COUNSEL.

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THE MURDOCK PRESS, S. F.

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In this brief, filed on behalf of the appellant, three questions will be discussed, namely:—

1. Does the record show that the appellant is chargeable with negligence because of the manner in which

its appliances for handling sugar were handled at the time the appellee was injured?

2. Was not the accident in fact caused by the negligence of the appellee and his fellow servants?

3. If the court shall find that the record discloses actionable negligence on the part of the appellant, should not an order for taking further testimony in this court be made before attempting to fix the amount of damages to be awarded?

The last question will not require an answer if either of the first two are answered in favor of the appellant.

The propositions stated are fully covered by the assignments of error. (See assignments of error 2, 5, 6, 7, 8, 9, and 10, Transcript, 257-258.)

I.

THE RECORD DOES NOT SHOW NEGLIGENCE ON THE PART OF THE APPELLANT OR OF ANY OF ITS SERVANTS.

The appellant owns and conducts a sugar plantation upon the windward side of the Island of Hawaii, and has a wharf or landing at Paauhau. Ships are not able to come alongside of said landing, nor are the ships' boats able to do so, but the bags of sugar, ten at a time, are lowered by a derrick into boats which are kept in position a few feet away from the landing by the use of oars. The bags of sugar are bound with a rope or sling on the wharf, are raised slightly and swung out over the water; there they are held until the men in the

boat want them lowered, when, upon signal from the men in the boat they are let down and guided to the desired position by two sailors, who have no other duty to perform than to so assist in the loading. (Transcript, 50, 56, 69, 71, 72, 91.)

The appellee, Palapala, was one of these attendants. (Transcript, 91.) The derrick was manipulated by a man who is described in the record as a "winchman," who occupies an elevated position from which he can plainly see the boat below. (Transcript, 46.)

Early in the afternoon of March 19, 1903, the steamer "Helene," belonging to the Wilder Steamship Company, the employer of the appellee, sent her boats to receive a cargo of sugar from the appellant for transportation. One of these boats received a load and departed for the ship; another, the one on which the appellee was employed, had received one "sling-load" of sugar and was in the act of receiving a second when the appellee was hurt. The contention of the appellee upon the trial was, that the injury was caused by the rapid and unauthorized lowering of the sugar by the "winchman."

It is the determination of just what occurred at this particular point of time, and the definite ascertainment of the true cause of the injury, that must determine whether or not the appellant shall be held responsible

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NOTE.—(When not italicised references are to testimony of witnesses called by appellee).

for the injuries sustained by the appellee, and it is just here that the testimony adduced in behalf of the appellee is vague and contradictory, while the general conclusion of the witnesses, to the effect that the injury was caused by the rapid and unauthorized lowering of the sling-load by the winchman is clearly refuted in each instance by the witness's own testimony as to his position and ability to see, or by what he actually saw or failed to see, and what he did. Upon this crucial point of the case, the testimony of each witness called by the libelant, the appellee, on the direct, consists of one or two mere generalities. And not only is this so, but it will be found that several of the witnesses were interrupted in their attempt to give a natural narrative of what occurred, by counsel for appellee asking a new question or giving an instruction to the witness to confine himself to a direct answer to the question asked.

It will be noted that although each of these witnesses called by the appellee testified that the sugar was lowered by the winchman at the time of the injury, yet none of them actually saw it so lowered. While the fact that it did not move at all is clearly apparent upon a careful examination of the rest of their testimony, is positively stated by the witnesses for appellant, whose testimony setting forth the impossibility of the lowering of the sugar, because, had it been lowered, they would have seen the steam escaping at the time, for any motion of the "winch," whether up or down, is accompanied by escaping steam, was not denied by any of the

witnesses of the appellee, although all but the appellee himself, were recalled in rebuttal.

There is no claim on the part of any of the witnesses that there was anything wrong in the method of loading the sugar, or in the construction of any of the appliances or machinery used. The claim is that the winchman rapidly lowered the sugar without being notified to do so. It is necessary then to find out just what the record discloses as to the situation at this particular point of time.

The Witnesses For Appellee.

Five witnesses, including the appellee, testified in his behalf as to the accident. They were the occupants of the boat and constituted its crew. They were Hina and Kewiki (or David) rowers, the appellee and Bob Samoa (Toka), loaders, and Kia, the boatswain, who steered the boat and was in charge of it. (43, *161*, 96.)

The boat, a sort of whale-boat pointed at both ends, of about twenty-five feet in length, (112), was free upon the water (98, 113) some twelve or fifteen feet from the shore (131), and alongside of the landing (62), with the bow pointed towards the sea and the waves (49, 89), facing the wind (90).

Hina rowed the boat on the outside and sat away forward (49). Kewiki had the oar on the left side (68) and came next to him (51). They sat with their backs towards the sea (52), facing the space in which the load was to be put, but when the accident occurred

they "were looking out for the boat" (57) "minding their own business" (58).

Next came the two loaders, Samoa and Palapala (the appellee), who were stationed "in no particular place," but were "always here and there in the boat" (68). Palapala at the time of the accident, was right in front of the boatswain, on the right side of the boat nearest the wharf (68), with his back to the landing, looking into the bottom of the boat (69) fixing a second canvas, "which through some mistake" (129) was under a sling-load of sugar that had already been placed in the boat.

Samoa was six or eight feet from him, also engaged in pulling at the canvas and looking down (93). The boatswain stood in the stern, steering the boat, facing forward and looking at the two oarsmen (105).

Paauhau and the Method of Handling Sugar There.

The landing at Paauhau is on the windward side of the coast of Hawaii, and "faces the wind" (90). The sea-going ships drop anchor in about one hundred and thirty feet of water, and lie there while the boats go ashore for cargo. The sea rolls in toward the land with a blind swell, which is caused by a sudden rising of the bottom as land is approached. The coast is very abrupt with many rocks lying around (*155-156*).

The "landing" consists of a "kind of warehouse," and is situated some distance above the "wharf." On one side of the landing there is a shed where steam is

generated with which to work the winch (*174*). The "wharf" is a masonry construction and, when measured by a witness called by the appellee, was found to be twenty-two and a half feet above sea level, though the witness was unable to say whether that was at high or low tide (107-109).

The answer admits that the following description contained in the libel, as to the method of handling sugar is correct:—

"On said wharf there was a derrick so constructed as " to be capable of being swung out over the edge of " said wharf so that sugar hoisted thereby would be " suspended over the water; attached to the upper end " of this derrick was a block, and at its heel there was " another block, and through these two blocks a wire " fall was rove; at one end of this fall was attached a " hook used to hoist the sling-loads of sugar, while the " other end of said fall led to the steam winch which " was used to hoist the sugar to the end of the derrick, " and thence to lower it into the boat."

The boat is kept free upon the water, but is supposed to go right up close to the masonry (109). It thus lies alongside the wharf with bow to sea twelve or fifteen feet from the land (130-131). When the waves come in the effect upon the boat is that it is backed up and raised. With the receding of the waves the boat goes forward and down (131-132).

The question whether the boat shall come in to get sugar or not rests with the captain of the ship. If he thinks the weather is suitable, he orders the boat to go

after the cargo (62), and sometimes it happens that when the boat is in there to receive sugar, a big wave will come in, and the boat has to leave its position and go out where the water is deeper and there is more sea room. When the boatswain sees a big wave coming in he gives orders to the crew to row the boat out, and then, after it is quiet, they come back (99-100).

When the boat is in position to receive the sugar, the first thing that is done is to put the sacks of sugar in the sling (the sling is a rope and belongs to the ship (*157*); then the sling is hooked to the hoist and the winchman is notified by the laborer on the wharf to raise it. It is then raised until it is a foot above the level of the wharf, when it is swung out (69).

After the sling-load of sugar leaves the wharf and is carried out on the derrick, it is lowered down by the winchman half way. "As soon as the sling-load is " right above them where they can catch hold of it, " they take their hands and try to get it just where they " want it, then the boatswain gives the order to lower " it." It is then lowered a second time, and the loaders place it in the right position in the boat (50-51). In bad weather two or three sling-loads at a time are taken; in good weather four to six (*164*). The ship has three boats in which the sugar is so carried from the wharf to the steamer (43). On the day of the accident one of the boats had taken a load and gone away. The next boat received her first sling-load of sugar all right; the accident occurred while she was receiving the second (62).

Description of the Accident.

There are two points of conflict between the testimony of the witnesses for the appellee and the appellant. The witnesses for the appellee assert that the sea was calm at the time the accident occurred, and that the winchman lowered the sling-load of sugar "very fast," without being notified to do so by anyone in the boat. The witnesses for appellant testify that the sea was rough, and that a large wave forced the boat up and against the sling-load of sugar at a time when it was remaining stationary over the boat in the position in which it was required to be, pursuant to the customary method of loading, which is described alike by all and is stated above.

The first witness called by the appellee is Hina, one of the rowers. His description, if it can be called a description at all, is as follows:—

"A. It was lowered half way down, but it was not " to be lowered to the boat before we gave the signal, " but before we gave the signal it was lowered and he " was hurt then.

"Q. How did he get hurt?

"A. By the sugar."

He then continues with this remarkable statement, which is quite untrue, and cannot be accounted for in any other way than that the witness was testifying without thought, to something that he had committed to memory, possibly in the presence of other witnesses:—

"As the sugar was lowered half way down, Sam " Palapala and myself were covering the first load with

" canvas and before we had it covered and before we " notified them, the men in charge of the winch low- " ered it." (44.)

On cross-examination (Transcript, 52) he testified:—

"Q. Beside rowing the boat you had to keep watch " of the waves, did you not?

"A. Yes.

"Q. The waves came in behind your back?

"A. It is not our business to watch the waves, all we " have to do is to obey the orders of the boatswain and " when he says 'Row' to row." (52.)

And on page 57, in answer to the question, "What " did you do when you saw him struck with the sugar?" he says:—

"A. We could not do anything because we had to " look out for the boat, we had to attend to it." * * * * * *

"The waves would dash us against the landing if we " did n't look out for the boat with our oars." (57.)

And on page 58 is the following:—

"Q. When this accident happened when the sugar " came down you were tending to your own business, " were you not?

"A. Yes, I mind my own business."

It is quite evident that the witness was not assisting Palapala, as described above. It is also quite evident that his mind was not upon the loaders, their work or their dangers; otherwise would he not have warned Palapala to look out? His mind must have been riv-

eted upon the waves and their threatening danger to the boat.

There are other features of this witness's testimony upon cross-examination, which render it quite certain that the sling-load of sugar was not being lowered at the time that Palapala was hurt; but that will be discussed hereafter under the heading, "Was the sugar lowered at the time of the accident?"

The same unsupported conclusion is found in the testimony of the other rower, Kewiki:—

"Q. How did it come about, that the second sling-
" load of sugar should hurt this man?

"A. It was on account of the winchman lowering the
" sling-load of sugar without being notified to do so.

"Q. When the sling-load of sugar came down, de-
" scribe how it came down, whether fast or slow—the
" second sling-load?

"A. It was a Japanese that had charge of the sling-
" load of sugar, and first prepared to hoist it up to the
" winchman. He gave orders and they hoisted it until
" it was one foot above the dock, when he then gave the
" signal to push it off, then the winchman lowered it
" out half way." (63.)

The court will notice that he was proceeding with something like a detailed description, but this was not wanted by counsel for appellee, who interrupted the witness and repeated his question:—

"Q. What we want to know is, at the time that it

" struck Palapala, did it come down, fast or slow, how " did it come down?

"A. It came down very fast."

This constitutes the whole of the witness's description, of the accident, on the direct, up to the point where Palapala was struck.

On cross-examination, in answer to the question, "How long before the sugar struck Palapala, did you " know that it was coming down?" he testified:—

"A. I think it was about two minutes." (74.)

What did he do? Did he call out to Palapala, warning him of his danger? Did he go to his assistance? No, he "rowed on the boat." (74.)

So too with the next witness Samoa. His description will be found on page 82 of the transcript. It is a model for brevity:—

"Q. Just describe in your own way, how it was that " Palapala got injured on that occasion?

"A. We were on the boat, and the boat was shifting " out and in, out and in, when the sling-load of sugar " fell.

"Q. Just before this sling-load of sugar fell, what, " if anything was said or done, by the men in the boat?

"A. Somebody was hurt. There was nothing said."

On page 83 the description is completed:—

"Q. When the sugar fell, where did the sugar strike " him?

"A. Right on the breast." (Indicating his right breast.)

A rather singular place for a *falling* weight to strike a man. It would naturally have hit him on the head or back,—especially if he was leaning over as he says he was, leaning over to such an extent that he was unable to see it when it struck him (127).

The description is concluded in these words:—

"Q. How did that sugar come down? Fast or slow?

"A. Very fast."

We submit that not much weight is to be attached to such descriptions as these.

On cross-examination this witness lets us into the real secret of the cause of the accident. We call attention to the following:—

"Q. What were you doing?

"A. I and Palapala were the ones to receive the "sugar.

"Q. Just prior to Palapala being struck, what were "you doing?

"A. We were trying to get the canvas from under "the first sling-load of sugar and we were looking at "that.

"Q. Was your position—were you bending down "looking at the canvas in such a way that you could not "see the sugar when it came down?

"A. No, we were standing upright then, trying to "pull the canvas out from under the first sling-load of "sugar when Palapala was struck.

"Q. About how far apart were you?

"A. I was as where I am sitting and Palapala as "where the bottle of ink is (indicating thereby the

distance between the witness's chair and a point on the clerk's table, a distance of possibly six or eight feet.—Rep.)

"Q. How was it that you did n't see the sling-load "until it struck Palapala?

"A. I was busy at my work.

"Q. What do you mean by saying a few minutes ago "that you were standing up and pulling at this canvas?

"A. I was standing up, but the work is down, so I "had to look down.

"Q. Palapala and you were engaged at the same "work at that time?

"A. Yes." (93.)

We will demonstrate later that it was the duty of these persons in the boat to watch that sugar, and it was their fault that they were not doing so at the time of the accident. (See heading *infra,* "The trouble with the "canvas." (Page 73.)

The court will observe that this witness, like Hina, was "busy at his work"; in other words his mind was elsewhere employed. He was not looking at the sling-load of sugar, was not in a position to know, and did not know whether the sling-load of sugar came down or stood still. That the sling-load of sugar, if stationary, was just where it should have been, is undisputed, and is proven, in fact, alike by the witnesses for the appellee and the appellant.

Kia, the fourth witness, is also a man of few words. His description will be found at page 96:—

"Q. Were you in the boat at the time he was injured " at Paauhau, Island of Hawaii?

"A. Yes.

"Q. I wish without any questions from me you " would go on and describe that occurrence.

"A. I am the boatsteerer on the boat. The crew of " the boat had to take orders from me. We went up " there to receive sugar, to the wharf. We received " the first sling-load of sugar all right, the second sling- " load of sugar was lowered down by the winchman " without any notification from me or any of the crew " of the boat, very fast.

"Q. What happened, did it strike anybody?

"A. Sam Palapala was hurt."

On cross-examination, page 103, he testifies:—

"Q. Where in the boat was Palapala just before this " sugar struck him?

"A. He was on the side next to the landing, in the " boat on the right side, working on this canvas.

"Q. Stooping down trying to get this canvas from " under the sling?

"A. Yes.

"Q. It was while he was engaged in that work, as " you have described, that the sugar struck him?

"A. Yes."

The marvel is that he, who gave orders, did not look out for the safety of the men who were looking down at the canvas. But of this too more will be said later.

Kia then lets us into the secret of his failure to see the accident:—

"Q. What assistance did you lend Palapala, if any?

"A. I did not give any hand to help him at all, it " was Bob.

"Q. Why did n't you go to help him?

"A. I was steering the boat.

"Q. You had to look after the boat?

"A. Yes.

"Q. It was not calm enough to help this man that was " lying down, as you say, helpless?

"A. It was calm enough to give him our hand, but " the boat would be shifting here and there.

"Q. If you had not attended to the boat it would " have been dashed upon the rocks, would it not?

"A. I think it would."

And finally he admits squarely that he failed to see the accident:—

"Q. Did I understand you to say that you did not see " the sugar descend until it actually struck Palapala?

"A. No.

"Q. Is that right?

"A. Yes it is.

"Q. You were sitting in the back of the boat facing " the sling-load?

"A. I was facing forward *looking at the two oars-* " *men.*" (104-105.)

Palapala's description of the accident is no more full than those just given. He begins by saying that the steamship was fifty to one hundred yards from the wharf, names the five persons in the boat, describes the

small freight boat that they were using, and then says:—

"A. We did not make fast to the wharf because " when we got alongside the wharf there were two oars- " men supposed to keep the boat away from the wharf " all the time."

* * * * *

"A. When we got up to the wharf we received the " first sling-load of sugar.

"Q. When that sling-load was received in the boat " what was the next thing that you did?

"A. The next thing that I did was to try to get the " canvas with" (from beneath) "the first sling-load of " sugar, with the assistance of Bob, so as to get enough " canvas to prevent the sugar from being wet." (113.)

It appears later by his own evidence that this was the second canvas that had gotten under the first sling-load of sugar "through some mistake." (129.) His description of the accident itself, is in the following words:—

"Q. While you were doing that what happened?

"A. While I was fixing this I was stooping down " when I stood up with this canvas that was the time I " was struck with this sling-load of sugar." (113.)

He also relieves the winchman of all blame, unless he did in fact lower the sling-load, which we will submit hereafter was not the case. He testifies:—

"Q. Just before you got struck by that sling-load of " sugar where, if you know, was that sling-load of " sugar that struck you?

"A. It was suspended over half way.

"Q. How was it held there?

"A. It was held by the winchman." (113-114.)

Then, without any testimony from him on the point, his counsel assumes that it "descended."

"Q. When that sling-load of sugar descended de-
" scribe its rapidity, I want the rapidity of its descent.

"A. That sling-load of sugar was lowered half way
" while I was tending to the canvas. This sling-load
" of sugar was lowered so fast that I did n't have time
" to get out of the way." (114.)

That is his testimony on the direct.

On cross-examination he admits squarely that he saw the sling-load of sugar lowered half way, but did not see it moving again afterwards. We quote the following:—

"Q. Do I understand you that you did not see the
" sling-load that hurt you until it actually struck you?

"A. I seen the sling-load lowered half way—low-
" ered by the winchman half way.

"Q. After that you did n't see it again moving until
" it actually struck you?

"A. Yes, sir.

"Q. You did n't see it come down to strike you?

"A. I did n't see it because I was fixing up the can-
" vas when I was stooping down. When I stood up the
" sling-load struck me on the breast." (127.)

This is the testimony of the witnesses called by the appellee upon the turning point of their case. It con-

sists in each instance, except, possibly one, of a general statement made by a witness who afterwards admits that he did not know what he was talking about; that he did not see what he testified took place. And the one, Kewiki, who is the possible exception, makes such an improbable statement in view of all the facts, that he is not to be believed.

Had he seen the sugar suspended half way as he has described it to have been, for a period of two minutes prior to the accident, and had also seen that the two loaders were engaged in looking down at the canvas instead of preparing to receive the sugar, would he not naturally have called their attention to it? Had he seen the sugar coming down "fast" what could have restrained the natural impulse to shout, "Danger?" His silence and failure to do the natural thing is the best possible evidence that the sugar was not coming down at all, but was hanging there exactly where it ought to have been, and where it had been for the previous two minutes. The remarkable thing about it all is, that none of the persons in the boat either ordered the sugar raised or the boat pulled ahead where it would be out of danger until the trouble with the canvas was over.

Was the Sea Calm at the Time of the Accident?

In order to support the theory of the lowering of the sugar, it was necessary to show that the sea was calm at the time of the accident, and that there was not and could not have been a large blind roller, as claimed by the appellant. Consequently we find a few general

conclusions on this subject on the part of witnesses for the appellee, accompanied by the same inconsistency when details are given and the same utter impossibility of truth. The "calm" idea developed as the case proceeded.

Hina does not mention the weather on the direct. On cross-examination he testifies that it was rough:—

"Q. Have you not stated that it was also your busi-
" ness to watch the waves?

"A. Everybody is supposed to do that when it is
" rough; everybody is supposed to do that.

"Q. What was the condition of the sea at the time
" this accident occurred?

"A. It was quite rough.

"Q. Was the boat dancing around?

"A. Yes.

"Q. Is it not a fact that on this occasion, when this
" accident occurred, that the waves were dashing over
" the wharf at intervals—I don't mean every minute?

"A. Yes." (52.)

But after objection by counsel for appellee that the witness had not said "big waves," his testimony, like the weather, calms down a little:—

"Q. Were these waves big waves or small waves?

"A. Not very big, quite small.

"Q. Was it a very rough sea?

"A. It was quite rough in the morning; it was not so
" bad in the afternoon.

"Q. Was it bad at all?

"A. In the morning and part of the forenoon, but " after lunch it was all right.

"Q. Is it not a fact that the weather continued very "rough through into the next day?

"A. No; in the morning and forenoon it was quite " rough, but in the afternoon it cooled down a little." (52-53.)

This is Kewiki's testimony about the weather, on the direct:—

"Q. I will ask you to describe the condition of the " weather, on the day this thing occurred? I use " weather in the sailor's sense, meaning both wind and " sea.

"A. In the morning it was quite windy and rough.

"THE COURT. The wind was blowing in the morning " it was then rough?

"A. Quite rough. In the afternoon it had calmed " down.

"Q. Were there any waves in the afternoon?

"A. There were some waves, but all small ones." (66-67.)

It will be observed that he is not asked, and does not attempt to describe, the condition of the sea *at the time the accident occurred.*

On cross-examination the following will be found:—

"Q. About what time was it that the sea calmed " down?

"A. After twelve o'clock.

"Q. What time was the accident?

"A. After twelve o'clock.

"THE COURT. How much after?

"A. I think it was between one and two o'clock.

"Q. How much was it after twelve o'clock when the " sea calmed down?

"A. I don't know.

"Q. I want to know about the weather after twelve " o'clock; tell us, if you can, how much after twelve " o'clock it was, that the sea calmed down?

"A. I think it was half an hour after twelve o'clock." (75.)

We submit that one has only to go out to the ocean beach here after the wind has been blowing and a high sea rolling in, to find out to what an extent such a sea will calm down under ordinary circumstances in an hour or less.

The witness Samoa, on his direct, testified:—

"Q. When you came in and got alongside the wharf, " I wish you would describe the kind of waves that " were there, at that time and place, that afternoon, " alongside the wharf?

"A. I saw the *wind* at that time.

"Q. How big were the waves?

"A. Sometime the waves rose *as high as the wharf* " and farther down." (84.)

This is Kia's first evidence on the weather question:—

"Q. What was the condition of the weather on that " day as to wind and sea?

"A. It was calm so we could work.

"Q. You mean it was calm all day?

"A. It was quite calm in the afternoon. We had to " watch for our chances.

"Q. What do you mean by having to watch for your " chances?

"A. Well, we had to see when the sea was calm, that " is the time for us to go in.

"Q. During the afternoon it would be rough at times " and calm at times, and you would take advantage of " the calm moments to rush in?

"A. Yes." (101.)

Apparently realizing that his last answers were somewhat inconsistent with the "calm" idea, the witness, when asked, "What do you mean by saying that during " that afternoon you had to watch for your chances?" testified:—

"A. We watched for our chances because sometimes " there were other boats at the landing and we watched " for them. When they came out we came in.

"THE COURT. You watched for your chances with " reference to the waves or something else, let us find " out?

"A. Yes, we wait for our chances. We wait until " one boat is loaded, and when that boat came out, our " boat came in. Not in reference to the waves.

"THE COURT. So that no time that afternoon the " storm or the waves interfered with the loading of the " sugar?

"A. No." (102.)

This, although following directly upon his statement that they had to watch the sea for their chances to find

a time when it was calm enough to go in, and being utterly irreconcilable with it, is, we submit, no more irreconcilable than is his prior statement that the winchman lowered the sling-load of sugar "very fast," followed by the admission that he did not see it at all at the time of the accident. The two taken together show how little credibility can be given to his testimony. But the quoted testimony is not all that the witness gives to assist us in arriving at the truth about this weather question. Following the last question and answers quoted is this evidence:—

"Q. How had the waves been in the morning, rough
" or calm, big waves or small waves?

"A. In the morning, high seas, high waves.

"Q. Would you say it was very rough?

"A. It was very rough.

"Q. About what time did it calm down?

"A. I think it was after twelve o'clock." (102.)

We submit again that a very rough sea with high waves, does not calm down in an hour or less. Moreover, on his direct, page 98 of the record, he testified in answer to the question "What is the purpose of that
" canvas, what purpose is it intended to serve?"

"A. So the sugar won't get wet."

On cross-examination, page 99, he testifies as follows:—

"Q. What danger was there of the sugar getting wet
" by your transferring it from the wharf to the steamer?

"A. The company would lose by it.

"THE COURT. What was the danger?

"A. The danger of being wet by the sea water.

"Q. You mean the waves going over the boat?

"A. Yes.

"Q. About what time was it this accident occurred?

"A. In the afternoon.

"THE COURT. What time in the afternoon?

"A. I think between one and two o'clock.

"Q. Was this the first trip you made after dinner?

"A. Yes.

"Q. What time do you take dinner?

"A. Half-past eleven o'clock.

"Q. If you take dinner at half-past eleven o'clock, " and you state this occurred the first trip after lunch, " how do you place the time as between one and two " o'clock?

"A. Well, we have to wait until it is calm enough for " the boats to go up to the wharf.

"Q. You mean you leave the steamer, then you have " to wait for some time before you get a favorable op- " portunity to go to the wharf?

"A. Yes."

Evidently if the sea had been as calm as he was trying to make out under the "calm" idea, all this caution in regard to favorable opportunities and protection from sea water would have been quite unnecessary. But there is still other testimony in the record that further emphasizes the idea that the sea was rough, and at the very time that the accident occurred.

It will be remembered that the boat was free upon

the water; was kept in place by the use of oars; that the oarsmen received their orders from this same Kia, who stands in the stern steering the boat, and who also gives orders to the winchman when he shall lower the sugar; (44) who is in fact in general charge of the boat and the loading and exercises a liberal amount of discretion in all matters pertaining thereto.

The testimony referred to is found on pages 103 to 105 of the record, and shows that something about the action of the waves riveted his attention quite closely, not upon the sling-load of sugar nor upon the winchman, nor yet upon the loaders who were working at the canvas. His whole attention was fixed upon the *oarsmen*:

"Q. What assistance did you lend Palapala, if any?

"A. I did not give any hand to help him at all, it " was Bob.

"Q. Why did n't you go to help him?

"A. I was steering the boat.

"Q. You had to look after the boat?

"A. Yes."

* * *

"Q. If you had not attended to the boat, it would " have been dashed upon the rocks, would it not?

"A. I think it would".

* * *

"Q. You were sitting in the back of the boat facing " the sling-load?

"A. I was facing forward looking at the two oars- " men." (104.105.)

Palapala himself, has little to say about the condition of the sea at the time the accident occurred. On cross-examination he testifies as follows:—

"Q. How was the boat behaving at that time?

"A. (Through the Interpreter.) It was not very " steady. It was going forward and backward.

"Q. What was making it go forward and backward?

"A. (Through the Interpreter.) The waves. When " the waves come in it makes the boat go in and come " back again." (129.)

* * *

"Q. What is the effect of the waves upon the boat? " What was the effect of the sea coming in?

"A. It is backed up.

"Q. Any other effect upon the boat?

"A. When the waves come in it draws the boat in " and the oarsmen row the boat out again." (131.)

* * *

Is it not apparent that the sea was anything but calm? Does not all the intrinsic and most of the direct evidence establish that it was rough and treacherous?

What Do the Witnesses for Appellant Say upon These Two Points?

The witnesses for the appellant testify:—

a. That the sling-load of sugar was not lowered at the time of the accident.

b. That the sea was rough and that a large blind roller came in, raising the boat, and throwing it against

the sling-load of sugar which was suspended over the boat, in the very position in which it was required to be kept under the custom of loading as described by the witnesses for the appellee.

A. The Sling-Load was not Lowered.

Five witnesses also testify for the appellant as to the manner in which the accident occurred. Captain Nicholson, master of the steamer "Helene" (*153-172*); Richard Westoby, in charge of the landing (*177-182*); Naka, an employee who bound the sling about the bags of sugar (*183-192*); S. Fuijimoto, also employed on the landing (*192-194*), and Manuel Enos, the winchman (*194-204*).

The captain of the steamer testifies:—

"Q. Did you see the accident to Palapala?

"A. Yes, I was looking positively at the time." (*157.*)

* * *

"THE COURT. * * * What we want to know is " what happened that morning?

"A. I would like to tell it just as I saw it.

"THE COURT. That is all right.

"A. I was sitting by the rail of the steamer, and " when I would see my vessel roll very heavily in an " exceptionally large swell, I would whistle to them, " and when they heard me whistle, they would start to " pull out from underneath the crane as quick as they " could. The whistle was a warning that a big swell " was coming in.

"THE COURT. Could you whistle loud enough to be "heard?

"A. I think I could whistle loud enough to be "heard down at the post-office. (Distance of five "blocks.)

"Q. What would they do when they heard you "whistle?

"A. They would always then pull out from danger.

"Q. What danger?

"A. The danger of the boat being under the crane "or dashed to pieces. Then when they saw this sea "was past to the best of their judgment, they would "back the boat underneath the crane again close enough "so that they could receive the slings of sugar. This "time, I think the boat had been in and out, in and out "three times. This was the second or third time they "had been under the hook. That is I whistled for "them to come out and they came out. That time they "got underneath the hook was the third time they "had been under the crane. A big swell had come and "I whistled and that told them to go back out until "the swell had passed. They got back this third time "when this accident happened. That is, they had cir-"cumnavigated three times." (*159-160.*)

The captain's testimony, to the effect that the boat had been in and out three times in obtaining that load of sugar, is not denied by any of the witnesses of the appellee, although all but the appellee himself were recalled in rebuttal; nor is it denied that that was the third time that they had gone under the crane for the purpose of receiving the second sling-load of sugar.

Now with the sea rough and the danger threatening, were not the loaders, Samoa and the appellee, taking unwarranted chances, if they were stooping over fixing the canvas, as they have described? Ought they not to have been looking up, or, at least, ought they not to have fixed their canvas while the boat was out waiting for the sea to calm down sufficiently for them to go in and get the load?

Westoby, the man in charge of the landing, gives the following description of the accident:—

Having identified the day of the month upon which it occurred, he is asked, "Where were you?"; the testimony then proceeds:—

"A. Near the landing looking down towards the " foot of the landing.

"Q. Did you see the accident?

"A. I did.

"Q. Was there anything to obscure your view?

"A. No.

"Q. What time did it take place?

"A. In the afternoon, a short time after lunch.

"Q. Can you give us a little closer idea, as to time?

"A. Between one and two o'clock.

"Q. What were the conditions of the weather that " day, as to wind and sea?

"A. Very rough.

"THE COURT. That is, the sea was rough?

"A. The sea was rough, yes sir.

"Q. How was it at the time the accident took place?

"A. It was very much the same all day.

"Q. Will you describe to us in your own language "how this accident took place?

"A. I was standing at the window of the landing." (*173.*) * * * "To one side there is a shed where "the steam is generated to work the winch. The sugar "is stored in the house. In fact the landing is a kind "of warehouse." (*174.*)

* * *

"Q. Is this on the mainland or on the wharf?

"A. The mainland.

"Q. How far is that from" (above) "the wharf?

"A. About 150—145 to 150 feet.

"THE COURT. Well, go ahead.

"A. I saw the sling-load of sugar was in the fall at "the foot of the landing, hanging on the crane. The "boat was underneath the sling of sugar that was hang- "ing there. There were two men ready to receive the "sugar as it would come down. The sugar was stand- "ing perfectly still. The rollers coming in raised the "boat, and sometimes drifted it shorewards. At the "same time, these men were standing reaching for the "sugar, in this position (indicating a position of the "arms outstretched above the head). A roller struck "the boat, it also raised her and jammed him. The "winchman then started to take the sugar up. The "boat receded down, and the boys pulled away from "the landing.

"Q. You say you were at that time 145 to 150 feet "away, what do you mean?

"A. One hundred and forty-five to one hundred and "fifty feet above the boat on the landing.

"Q. You were looking down?

"A. I was looking an inclined plane.

"Q. How far were you away in a direct line?

"A. I am not sufficiently good in mathematics to tell " you how far I was in a direct line.

"THE COURT. Tell us about how far.

"A. Nearly 50 feet in a straight line." (*174-175.*)

* * *

"THE COURT. You were about fifty feet in a straight " line from where?

"A. From the boat, in a straight line.

"THE COURT. Go on, Judge.

"Q. When this boat was lifted up, as you say, and a " man in it was struck in the chest by this sugar, how " did he fall?

"A. When the boat came up he was jammed between " the gunwale of the boat and the sugar. The sugar " held him there until the boat receded, then he stag- " gered and fell in the bottom of the boat.

"Q. There is testimony to the effect that the winch- " man suddenly let the sling-load fall on the man with- " out any signal from them, what do you say about that? * * * And at such a rate of speed that it could not " be stopped?

"A. No." (*176.*)

* * *

"Q. What became of the sugar?

"A. It was hoisted up halfways so as to clear the " landing.

"THE COURT. Halfway up the arm of the—

"A. Boom.

"Q. How high is that?

"A. It hoists it about 20 feet above the boat.

"Q. What was then done?

"A. It was allowed to hang over in the sling at that " time.

"Q. Was it taken into the landing?

"A. Not then.

"Q. Was it taken into the landing at all?

"A. Yes.

"Q. What was the condition of the sugar?

"A. It was wet.

"Q. Wet by what?

"A. By the sea.

"THE COURT. The sugar was wet by the sea?

"A. Yes.

"THE COURT. You went down, did you?

"A. Yes, sir.

"THE COURT. And you saw it?

"A. I saw the sugar was wet.

"Q. Was that sugar shipped on that trip of the " 'Helene'?

"A. No, it was sent back to the mill." (*176-177.*)

The stars indicate immaterial portions of the record, objections of counsel, or temporary digressions from the main narrative.

The court will observe that the testimony is clear and precise, and that the witness, like the captain of the ship, denies that the sling-load of sugar was lowering at the time of the accident.

The next witness, Naka, an employee on the plantation, whose work at the wharf was that of lifting bags of sugar to a high place after they had been lowered from above; in other words, piling the sugar up, says that on the occasion of the accident he was working on the landing, and continues:—

"A. The man over there" (indicating some one, either the manager or the appellee) "was getting ready to " receive the bags of sugar from the upper landing " when a swell of the waves came and moved the boat, " causing him to strike the bags of sugar.

"Q. Where was this sling-load of sugar just before " this man was struck?

"A. It was just hanging there ready to be placed in " the bottom of the boat.

"Q. You mean it was hanging over the boat?

"A. Yes.

"Q. How high above the boat?

"A. About three or four feet.

"Q. Whereabouts in the boat was Palapala, before " he was struck by the sugar?

"A. He was standing right in the middle of the boat, " the center of the boat.

"Q. Was there no one else standing up in the boat?

"A. There were 5 people in the boat at that time, " 3 of whom were attending to the oars and the steering, " and 2 receiving the bags of sugar.

"Q. How was it just before the accident?

"A. The sugar was hanging over the boat. (*185.*)

* * *

"Q. Was anything done with the sugar, after you "saw it hanging 3 or 4 feet above the boat?

"A. Palapala was just getting ready to receive the "sugar, which was hanging over the boat, when a swell "of waves came and struck Palapala with the sugar.

"Q. Did the sugar itself move from the time you "saw it 3 or 4 feet above the boat, until after the man "was hurt?

"A. Palapala was just receiving the bags of sugar, "so as to put them in position in the boat, when a swell "of waves brought him in contact with the sugar." (*185-186.*)

And on cross-examination the following will be found:—

"Q. When you say the libelant here was in the act of "receiving the sugar, what do you mean by that?

"A. Palapala was then reaching up his hands for the "bags of sugar which were hanging over the boat, when "he came in contact with these bags of sugar." (*188.*)

* * *

"Q. Was not that sugar as far over the boat as is the "ceiling of the courtroom from the floor?

"A. Yes, about that.

"Mr. STANLEY. Does he mean that this sling-load "was that distance over the boat?

"A. What I mean by that is, that that is the height "between the landing and the boat.

"Q. Judge" (referring to Mr. Stanley), "ask him "if this sling of sugar was not as far from the boat as "the height of this room." (To the interpreter.) "Does "he mean that?

"A. What I mean to say is, that the *sugar* which was " then placed *on the landing,* down to the boat, is as " far from the floor to the ceiling, but the *sling-load* at " that particular time was 3 or 4 feet away from the " boat." (*188-189.*)

* * *

"Mr. STANLEY. With reference to that particular " part of the boat, do you mean the edge of the boat?

"A. He was standing in the boat and the depth of " the boat in which Palapala was standing reached up " to his waist.

"Q. If it is true that Palapala was standing there " with half of his body in the boat, and if it is also true " that the sugar was 3 or 4 feet above the gunwale, and " a big wave came along, how is it possible that that " man's shoulder got hurt? Would it not shoot past " the boat?

"A. While Palapala was standing in the boat a great " big wave came in and lifted the boat up so that he " was swung against the sling of sugar.

"THE COURT. The sugar did n't strike him, he struck " the sugar?

"A. It was caused by the moving of the waves.

"THE COURT. Did he strike the sling-load of sugar, " or did the sling-load of sugar strike him?

"A. The boat moved against the sling-load of sugar.

"THE COURT. Then he struck the sling of sugar, the " sugar did n't strike him?

"A. At that particular point I did n't see myself. I " saw the boat move, when Palapala was in the boat, " against the sling of sugar." (*189-190.*)

S. Fujimoto, a Japanese employed on the landing,

saw Palapala get hurt, and thus described the accident:—

"A. That day, the sea it was very rough that day. " One other Japanese by the name of Tanaka was put- " ting 10 bags of sugar in a sling; I was there at the " time. Tanaka was lowering the sling of sugar down " into the boat. It was up 4 or 5 feet above the boat, " when I saw a big swell of wave come and strike the " boat. The libelant Palapala was at that time pre- " paring to receive the bags of sugar which were hang- " ing over the boat, when the swell of waves came and " moved the boat backwards and struck his shoulder " against the sling of sugar. Just as soon as he struck " himself against the sling of sugar, he was assisted by " those in the boat, and was carried ashore.

"Q. Carried ashore?

"A. Carried ashore on the steamer." (*193.*)

On cross-examination he testifies that he did not notice whether or not Palapala stood with his arms raised.

"Q. What was the position of Palapala at the time that, as you say, he was preparing to receive the sugar?

"A. They were standing in the center of the boat " when this swell of wave came up.

"Q. Where were his arms, in what position?

"A. I could not see.

"Q. Did you have as good a view of this occurrence " as Naka?

"A. I did.

"Q. You say you could not see where his arms were. " Did you see his arms extended up above his head?

"A. I could not see." (*194.*)

With regard to the noticeable conflict in the testimony of the witnesses for the appellant and the appellee, as to whether or not Palapala was raising his hands at the time of the accident, as described by the witnesses for the appellant, or whether he was looking down at the canvas and did not see the sugar at all, as described by his own witnesses, we are inclined to believe that the witnesses for the appellee were confused, and that the truth of the matter is given by the witnesses for the appellant.

They would not be so quickly subjected to instantaneous excitement as would those in the boat. The unexpected action of the water, which required such intent attention to be given by the rowers and the steersman to the mere handling of the boat, would not, naturally, have operated so impressively upon the minds of those farther removed from the immediate scene of action.

So, while the testimony of the witnesses for the appellee, that the two loaders were looking down when they should have been looking up, is decidedly to our advantage, inasmuch as it shows that they were unwarrantably inattentive to their danger, we are inclined, nevertheless, to agree with the witnesses for appellant who attribute the injury to inevitable accident.

Our belief that the witnesses for the appellant were telling the truth is strongly enforced by the fact that none of the witnesses for the appellee, save possibly Kewiki, whose testimony is wholly improbable, actually saw the sugar at the time the accident occurred.

Then, too, while the oarsmen and the boatswain were intent upon the action of the water, there was time enough for Palapala to have straightened up and lifted his arms, as he is said to have done. He would naturally have had no recollection of what he did in the final moment before coming in contact with the sugar. He was rendered insensible as soon as the accident occurred.

The point of it all is, that the whole thing happened so quickly and so unexpectedly, that no one appreciated just how the accident happened. And while, if the testimony of the appellee's witnesses is true, and he is bound by it, there is shown to have been contributory negligence on his part. On the other hand, if it is not true the record shows a case of inevitable accident. Whatever the truth may be, we confidently assert that nothing can be found in this record to support a finding that the appellant, or any of its servants, was guilty of negligence at the time the accident took place.

The last witness for the appellant, who testified as to the accident, was the winchman, Manuel Enos. He had been employed upon the plantation for ten years, and there is nothing in the record that shows, even by inference, that he was either incompetent or inattentive at the time. On the contrary everything indicates that he was capable and keenly alert to all that was, or could have been, required of him. All the witnesses, with one possible exception (Kewiki), agree in stating that he raised the sugar instantly when the accident occurred.

The only claim made by the witnesses for appellee, was that he lowered the sugar at a time when he was not requested to do so; but that claim is, without doubt, a mere theory on their part. It is not something which they saw or testify to as a fact known to them.

Enos first describes the method of loading the sugar as follows:—

"Q. What do you do as winchman?

"A. Lower sugar into the boat.

"Q. What is the first thing done with the sugar; " when at the landing what is the first thing done?

"A. It is piled up on the landing, then it is put in a " sling, and then it is pulled over the landing, then it " is lowered down until it is as high as the boat.

"Q. The first thing that is done is to hoist it up?

"A. Yes.

"Q. What is next?

"A. Push the sugar over the landing.

"Q. Off the landing?

"A. Yes, I then lower it down.

"THE COURT. You lower it into the boat?

"A. No sir.

"Q. Where do you lower it?

"A. To this high over the boat. (Indicating about $2\frac{1}{2}$ feet.)

"Q. Afterward you lowered it into the boat?

"A. I lower it to that height and when I get the " signal I lower it further down.

"Q. What guide have you as to when you should " raise or lower the sugar?

"A. After it gets to this height I do not lower it un-
" til I get the signal.

"Q. Where do you get the signal?

"A. From the boatman.

"Q. What boatman?

"A. Whoever happens to be in the boat.

"Q. Do you remember when this man was hurt?

"A. Yes.

"Q. Where were you at that time?

"A. I was in the donkey.

"THE COURT. You were there when this man was
" hurt?

"A. Yes.

"Q. Now how was he hurt?

"A. I had the sling about this high (indicating
" about two feet); a wave came and the sugar struck
" him against the boat.

"Q. What part of the body did it strike him on?

"A. Right here (indicating the chest).

"Q. At the time that the sugar struck him what were
" you doing? Just before it struck him were you doing
" anything with the winch?

"A. No I had the sling stopped.

"Q. After you stopped it there, did you do anything
" again with the sling until after the man was hurt?

"A. No, sir.

"Q. What became of the man when he had been
" struck with the sugar?

"A. I pulled the sling up. Then the boy he fell down
" in the boat." (*196-198.*)

It will be observed that this witness also denies posi-

tively that the sling-load was lowered. He was certainly in a position to see, and did see, for he instantly raised the sling-load upon the appellee coming in contact with it.

Before summarizing the above evidence and discussing the weight of it, we will briefly call attention to the testimony of the witnesses of the appellant upon the condition of the sea at the time of the accident. They testify that,

B. A Blind Roller on a Comparatively Rough Sea Caused the Accident, without Fault on the Part of Either the Winchman or the Appellee.

This is Captain Nicholson's description of the weather:—

"Q. Will you state the condition of the weather on " the day that Palapala got hurt?

"A. It was bad weather.

"Q. Both as to wind and sea?

"A. It was the worst kind of a sea off the Hamakua " coast. The wind was north, directly across the track " of the rollers, right between of each one, making a " blind swell.

"Q. What is that?

"A. The sea rolls in a way that you cannot judge the " distance at all. One hundred feet from the landing " at Paauhau you get 19 to 20 fathoms, then it drops to " 40 to 45 fathoms. The sea rolls with a blind swell; " it rolls in such a way because the depth jumps from " 230 feet to 20 fathoms."

* * * *

"THE COURT. When the sea is from the north, it is " difficult to handle a boat?

"A. Yes. In fact, we stop work with half a wind. " We have to go to work from another direction.

"Q. You spoke of blind rollers coming in. Where " do they break?

"A. They may dash up against the landing. Some- " times it will take a boat and shove it right over." (*154-158.*)

The captain's testimony in regard to the condition of the sea is quite full and detailed. We have only attempted to give the gist of it, as we wish to condense the testimony as much as possible. A reference to the pages given, however, will give it all.

Westoby says of the weather:—

"Q. What were the conditions of the weather that " day, as to wind and sea?

"A. Very rough.

"THE COURT. That is the sea was rough?

"A. The sea was rough, yes sir.

"Q. How was it at the time the accident took place?

"A. It was very much the same all day." (*173.*)

Naka testifies:—

"Q. Did many of those waves come up to the land- " ing?

"A. Yes.

"Q. The fact of the matter is, that it was an un- " usually rough day, and the waves were very high, " and so high that many of them swept up on the land- " ing, is not that so?

"A. Yes.

"Q. There was some sugar on the landing that got "wet, did n't it?

"A. Some were wet.

"Q. They are very big waves when they sweep up "on the landing?

"A. These bags of sugar were wet by the coming up "of these large waves on the landing." (*187-188.*)

Enos says it was "awful rough":—

"Q. What was the condition of the weather that "day?

"A. Awful rough.

"Q. What effect did that have on the boat?

"A. A big wave came.

"Q. Ordinarily, what effect would it have on the "boat? (Interpreter here translates).

"A. Keep the boat in motion all the time." (*198.*)

And on cross-examination he repeats that it was "awful rough":—

"Q. You say the sea was awful rough?

"A. Yes.

"Q. How did you know it, did you see it?

"A. Yes." (*200.*)

We submit that the "calm" idea is not very well supported by the record. The little that can be found is only proof of the recklessness with which the witnesses for the appellee testified in support of a theory, and shows how little can be attached to their general conclusions. They knew that the sea was not calm, and their testimony as a whole clearly shows that the idea

was so far at variance with the truth, that they were unable to stick to it with anything like consistency.

The Law of Negligence and What Is Required to Prove the Same.

Before proceeding further, it may not be out of place to direct the court's attention to a few authorities, and to briefly summarize the testimony of the witnesses of the appellee and the appellant upon these two points of difference.

A leading Supreme Court case on the question of the liability of a defendant, where negligence is charged, is the Nitro-glycerine case, 15 Wallace, 524. After reciting the facts, and some law peculiar to carriers, the court quotes with approval, the following definition of negligence laid down by the court of Exchequer Chamber:—

"Negligence is the omission to do something which "a reasonable man guided by those considerations "which ordinarily regulate the conduct of human "affairs, would do, or doing something which a pru- "dent and reasonable man would not do." The court then continues: "It must be determined in all cases by "reference to the situation and knowledge of the "parties and all the attendant circumstances. What "would be extreme care under one condition of "knowledge and one state of circumstances, would be "gross negligence with different knowledge and in "changed circumstances. The law is reasonable in its "judgment in this respect. It does not charge cul- "pable negligence upon any one who takes the usual

The rules deducible from these cases are as follows:—

1. Where the duty is defined, the question arises whether that duty was performed. This is the test of negligence. If the duty was performed, one can not be held; if there was a failure to perform the duty there is liability.

2. In cases of accident, like the one before this court, where the injured party is rightfully at the place, and doing the work at the time of his injury, and the circumstances of the accident are such that it may have been unavoidable, the plaintiff, charging negligence, assumes the burden of proving it,—he must show that the defendant, by some act or omission, has violated a duty incumbent on it from which the injury follows as a natural consequence.

3. This does not mean the mere making out of a *prima facie* case, but the establishment of some specific failure or omission on the part of the defendant, sustained by a preponderance of the evidence.

With this statement of the law before us, and we cannot believe that the correctness of it will be questioned, what does the record show? It shows:—

First: That the method of handling sugar is defined, and so is the duty of the winchman; likewise the duty of the men in the boat;

Second: That there is a claim, a very weak and badly asserted one, that the winchman was negligent

in performing his duty, in that he carelessly lowered the sugar at the time of the accident;

Third: That this assertion is emphatically denied by the witnesses for the appellant; and

Fourth: That all the inherent probabilities of the case, strongly establish that the witnesses for the appellee were mistaken, that the winchman did not lower the sugar as charged, and that the accident occurred either through inevitable accident, or the failure of the appellee and his fellow-servants to take those precautions for their safety which the situation required.

Who Was Responsible for Taking Cargo That Day?

This has already been briefly referred to. The court will remember that the question of whether the sugar should be received lay wholly with the ship. On the day of the accident the ship was lying off the Paauhau landing, went away to another landing (Wookla), saw that it was too rough to take freight there, and so came back again to Paauhau. (*155-156.*) Moreover, the witnesses on both sides have testified that when they returned they lay there for some time (until after lunch), waiting for it to calm down sufficiently to warrant them, in their judgment, going after cargo. (75.)

So, too, the men in the small boat decide the question when they shall receive the sling-loads of sugar. (71-99.) And it will be remembered that on the day of the accident they had made three attempts to receive the particular sling-load of sugar that caused the injury. (*159.*)

The winchman on the other hand had nothing to say about these questions. His testimony is that he had no right to say whether it was rough or not as to his work; that he was required to work in any weather. (*203.*) In other words when the boatmen approached all that he had to do was to lower the sugar without arguing whether or not it was too rough out there for them to receive it. This is not denied by any of the witnesses for the appellee, although they were recalled to the stand after this testimony was given.

There is no conflict then as to who decided the question as to whether the sugar should be received; and if the accident arose from indiscretion in that respect, the fault lies with the boat and not with the plantation. And for any fault occurring on the boat, whether it was the specific fault of the appellee or of the captain, or the boatswain, appellant is not chargeable.

"When one enters into the employment of another " he assumes all the ordinary risks attendant upon it; " and where a number of persons enter a common em- " ployment for another, all being upon a common foot- " ing, and one receives an injury by the neglect of " another, they are the agents of each other, and no " recovery can be had against the employer."

Louisville etc. R. v. *Moore,* 83 Ky. 683-84.

And again:—

"It is implied in the contract that the servant risks " the dangers which ordinarily attend the business— " among which is the carelessness of those in the same " employment, with whose habits, conduct and capacity

" he has had an opportunity to become acquainted, and " against whose neglect he may guard himself."

Hough v. *Texas & Pac. R. Co.,* 100 U. S. 213-26.

Of course we do not assert that the law of master and servant, as such, enters in to relieve the appellant from the consequences of any negligence that the winchman may have been guilty of. What we do assert is that the winchman was not guilty of any negligence, and that, if there was any error of judgment or negligence on the part of any of the appellee's fellow-servants in the boat, it was his misfortune, and he cannot charge the appellant with responsibility for acts that arose from such a cause. If the accident arose either because the captain made a mistake in ordering him to go in after sugar on such a rough day and the boatswain kept the boat in there at a time when it was too rough to properly receive the sugar; or if, on the other hand, the boatswain made a mistake in not ordering them to go out until they fixed their canvas; or if they made a mistake themselves in looking down at the canvas when they should have been looking up at the sugar,— if any of these conditions or circumstances were the true cause of the accident, then, we assert, the plaintiff cannot recover from the appellant.

It must be presumed that the plantation company paid the ship sufficient freight to cover all contingencies, and that the men who accepted employment with the ship knew the dangers and were willing to risk them. Undoubtedly there were other carriers de-

sirous of competing for the business and the appellant could hardly be expected to dredge out a harbor in such an unlikely place as that was.

The Method of Loading the Sugar.

The method of loading the sugar has already been described, and there is no conflict as to that. It is described alike, or conceded by all the witnesses, and none find any fault as to that. It is, apparently, the best method that could be adopted on that rough and rocky coast.

Briefly it consists in placing the sacks of sugar in the sling and swinging them out over the water; lowering them near to the boat; holding them there until the boat is immediately beneath, and then, upon signal received from the boat, lowering them altogether.

Now if the record shows that this method was employed strictly, without any departure up to the point when the accident occurred, then surely the appellant is not chargeable with negligence. For then there will be no breach of duty, and without proof of a breach of duty there can be no liability on the part of the appellant for the injuries the appellee received.

What does the record show? Hina says in answer to the question, "Where was the boat at the time that he" (the libellee) "got hurt?

"A. Under the place where the sling-load of sugar " was to be lowered." (43.)

Showing that the sling-load was in the proper place, namely, over the boat.

Samoa testifies that:

"A. It" (the sling-load of sugar) "was hanging over " the boat there.

"THE COURT. How far up?

"A. About 15 or 20 feet above the sea.

"Q. Do you know what the height of that wharf was " above the water?

"A. I don't know.

"Q. Can you state how high?

"A. About fifteen or twenty feet." (94.)

In other words it was hanging out over the water, about even with the top of the wharf at the time that the witness last saw it, which was, undoubtedly, at a time when the boat was down with the falling of a wave. At the time of the accident it rose on the wave to within three or four feet of the edge of the boat.

We quote:—

"THE COURT. He says the sling-load of sugar was " down within 3 or 4 feet of the boat, *when the waves* " *came in.*" (*188.*)

The continuance of Samoa's testimony is very significant, for it demonstrates between the lines, absolutely, that the winchman was holding the sling-load exactly where it was required to be at the time the accident occurred.

"Q. While this load was so suspended was not the " boat shifting too?

"A. *It was not, it was quite still, it was steady.*

"Q. If the boat was steady, why was not the signal " given to let the sugar come down?

"A. We could not give any orders because the can-
" vas was under the first sling-load of sugar. We had
" to get that out before we could receive another one.

"Q. Was that the only reason the order was not given
" to let the sugar come down?

"A. *Yes, the only reason.*"

So, too, the appellee testifies unqualifiedly to the same effect:—

"Q. Just before you got struck by that sling-load of
" sugar where, if you know, was that sling-load of sugar
" that struck you?

"A. It was suspended over half way.

"Q. How was it held there?

"A. *It was held by the winchman.*" (113-114.)

We have already shown that it was the duty of the winchman to so lower the sugar, and to so hold it there until the loaders were ready to receive it. Now Palapala also shows what was the duty of the boat crew in this behalf:—

"Q. There is considerable action there, is there not?
" Considerable action in the boat while the waves come
" in and strike the boat and then recede?

"A. It cannot because we have two oarsmen to keep
" the boat steady. When the waves come we have the
" boys pull ahead.

"Q. There would be considerable action in the boat
" if it were not for these oarsmen, would there not?

"A. Yes.

"Q. When you see this action of the waves you roll"
(row) "the boat out of the way?

"A. Yes, we always try to pull out." (130.)

That is, it was the duty of the winchman to keep the sugar in place, stationary. It was the duty of the oarsmen, unless otherwise ordered, to get the boat squarely under the sugar until the loaders were ready to receive it. It was also their practice, at times of unusual likelihood of danger, "to pull out"; that is, they row out to a place of safety when the big waves come in. It was their custom to look out for their own safety. They did not depend upon the winchman—he was required to do his duty, they used their judgment.

The boatswain who was in charge of the boat, "from "whom the crew of the boat had to take orders" (96), whose business it was to notify the winchman to lower the sling-load (44), who watches the waves and says, "row" to the rowers (52), was the only man, by the undisputed evidence, vested with discretion and judgment. All of the others have prescribed duties to perform, and, clearly by the weight of the evidence and all the inherent probabilities, there was no failure on the part of any of those on shore to do their exact duty. The failure, the carelessness, the oversight, the negligence, whatever it was, came from the persons in the boat. They took a chance when they kept that boat in its place under the sling-load of sugar, and, with heads bowed down, worked upon that canvas which, "through "some mistake," had become caught where it ought not to have been. Hence, under the well-established rule that he who is most at fault must bear the consequences, the appellee cannot rightfully assert a claim against the appellant.

Was the Sugar Lowered?

Admitting that the crew were in proper position and that the winchman was not otherwise at fault, the crew of the boat joined in an assertion that the sugar was lowered "altogether" without an order from the boat to do so. The claim is a mere opinion, a conclusion, an inference, is not supported by detailed testimony, is badly shaken by all the inherent probabilities, and is emphatically denied by the five witnesses for the appellant.

Hina's testimony, it will be remembered, was to the effect that it was lowered half way down, "but before " we gave the signal it was lowered and he was hurt." But two things show clearly that he did not see the sugar: First, that he was attending to his own business, minding his oars (58), and, second, he did not call the attention of the loaders to their danger. (59.) Had his mind not been upon his own duties, but upon theirs, he would have seen that Palapala was about to be hurt and would have warned him. He was testifying to theory rather than fact.

There is like testimony from Kewiki, accompanied by the same inherent improbabilities. He puts it thus:—

"The second sling-load of sugar is the sling which " Palapala met with the accident.

"Q. How did it come about that the second sling- " load of sugar should hurt this man?

"A. It was on account of the winchman lowering " the sling-load of sugar without being notified to do " so." (63.)

It will be noticed that he does not say he saw the sugar come down, or testify to any fact, but to a mere opinion, which, under all the rules of evidence, especially in Federal courts, is entitled to very little consideration.

Ardmore Coal Co. v. *Bevil,* 61 Fed. 757.

A person who saw an event like that occur could certainly tell more about it. On the other hand, if he was not telling the truth and should be charged with perjury, he could escape by asserting that he was not testifying to a fact, but to a mere opinion, as to which he was mistaken. So, too, his testimony that he saw this sling-load of sugar suspended and hanging there "about two "minutes" prior to the accident, should be taken as meaning that he *had seen it* about two minutes prior to the accident, instead of for two minutes preceding the accident. (74.)

Samoa and Palapala, the two loaders, do not claim to have seen the sugar descend. They both testify, as we have already pointed out, that they were looking down at the canvas and did not see the sugar at the time the accident occurred. Samoa admits that he did not see the sling-load until it struck Palapala. He was standing up, but the work was down. He and Palapala were engaged at the same work at that time. (93.)

Palapala also says that he saw it lowered half way (the required and proper position), and that he did not see it moving again until it actually struck him. (127.)

The other witness, Kia, also disclaims having seen the sugar immediately preceding the accident:—

"Q. Did I understand you to say that you did not see " the sugar descend until it actually struck Palapala?

"A. No.

"Q. Is that right?

"A. Yes, it is." (105.)

The reason given by him, will be remembered, he was "looking at the oarsmen."

Now, on the other hand, the witnesses for the appellant assert positively that they did see the sugar.

Captain Nicholson says: "I was looking positively " at the time." (*157.*)

He swears that he saw the accident: "I saw the " plaintiff as he was in the boat; I saw the whole acci- " dent." (*163.*)

He says that the sugar was not lowered, and could not have been going down at the time, because if it had been he would have seen the steam escaping, which always accompanies any movement of the sugar, whether up or down. (*164-165.*)

Westoby also saw the accident, says that the winchman was doing his exact duty, and that he did not lower the sugar. (*175-176.*) He says:—

"Q. So that they" (the loaders) "were underneath " the sling-load of sugar?

"A. No, not beneath it exactly.

"Q. If they were away from it, how do you explain " their standing with their hands up, reaching for it?

"A. So that when the sugar started to come down, "they could push it forward or sideways, so as to "trim it.

"Q. They were so close to the sugar, that when the "sugar came down they could direct it to the proper "place in the boat?

"A. If the sugar came down he was near enough so "he could reach for it, and get hold of it.

"THE COURT. Did it come down so fast that it could "not be directed.

"A. It didn't come down.

"Q. It didn't come down?

"A. The sugar did not come down." (*181.*)

Naka denies that the sugar was lowered, and says:—

"Palapala was just getting ready to receive the sugar, "which was hanging over the boat, when a swell of "waves came and struck Palapala with the sugar." (*186.*)

Fuijimoto testifies to the same effect. (*193.*)

Enos says emphatically that he had the sling stopped. (*197.*)

This, briefly stated, is the whole of the testimony on this point, and we submit that it cannot be made the basis of a judgment against the appellant. This is a trial *de novo,* and the court examines the testimony and weighs it unqualifiedly.

The Sirius, 54 Fed. 188, C. C. A. 9th Circuit;

The Cloquitlam, 77 Fed. 744, 9th Circuit. C. C. A.

The burden of proof is on the appellee.

"A party charging negligence as a ground of actio
" must prove it."

Nitro-glycerine Case, and other citations above.

The most that can be said to the disparagement of the appellant is that the true cause of the injury does not clearly appear. It might possibly be argued that it does not *clearly* appear that the winchman did not lower the sugar, but this is not enough.

"Where an event takes place, the real cause of which
" cannot be traced, or is at least not apparent, it ordina-
" rily belongs to that class of occurrences designated as
" purely accidental, and, there being no presumption
" of negligence in such cases, the party who asserts neg-
" ligence must show enough to exclude the case from
" the class mentioned.

"A railroad company owes to one, not a servant of
" the company, who is lawfully engaged in loading a
" car upon its side-track, the duty to have its premises
" in a reasonably safe condition, and to prevent damage
" to him, and others having occasion to transact busi-
" ness with it, from any unseen or unusual danger of
" which it has knowledge or by the exercise of vigilance
" and sagacity should have knowledge.

"The obligation of the railroad company does not
" require it to make its depot and grounds absolutely
" safe, and where the circumstances of the accident sug-
" gest, at first blush, that it may have been unavoidable,
" notwithstanding ordinary care, the plaintiff charging
" negligence must show that the defendant has violated
" a duty incumbent upon it, from which the injury fol-
" lowed in natural sequence.

"The proper inquiry in such cases is not whether the "accident might have been avoided if the company had "anticipated its occurrence, but it is whether, taking "the circumstances as they then existed, the company "was negligent in failing to anticipate and provide "against the occurrence by the use of such reasonable "precautions as would have been adopted by prudent "persons."

Wabash, St. Louis and Pac. Ry. Co. v. *Locke,* 112 Ind. 404.

It is also held in this case that even a jury cannot infer negligence, "but the evidence must affirmatively "establish circumstances from which the inference "fairly arises that the accident resulted from the want "of some precaution which the defendant ought to have "taken."

Without multiplying authorities or elaborating upon the manifest weakness of the testimony of the witnesses for the appellee, we submit there is wanting that definiteness and association and relationship of details which carry conviction when witnesses are truthfully describing an occurrence of this kind. The whole thing savors of an agreed conclusion upon a supposedly material point, which had no foundation in truth. That the fiction is wholly impossible, is nowhere better demonstrated than in the utter inconsistency of the few details that are given with the general conclusion advanced.

Before proceeding to the second proposition we may briefly refer to two matters that came up on the cross-

examination of the winchman. Apparently recognizing that his client's assertion, that there was a sudden lowering of the sugar, had failed, counsel for appellee seems to have shifted his ground, and to have made an effort to show that the winchman ought to have raised the sugar before the accident occurred. But this effort was naturally unavailing, because the testimony all showed, without dispute on the part of his own witnesses, that the winchman had no discretion in the matter, and that his duty was to hold the sugar over the boat until he was ordered to lower it altogether. The whole discretion had to be vested somewhere. It could not be divided. It necessarily had to be lodged in someone on the boat, and was undoubtedly wisely assumed by the boatswain.

We quote:—

"THE COURT. Whose business was it to notify the " winchman to lower the sling-load?

"A. The boatswain's business." (44.)

"Q. You have stated that it was Kia who gave the " signal for the lowering or raising of that sugar, who " else in that boat could give such a signal?

"A. He is the only one who gives this signal. In " very calm times anyone can give the signal to the " winchman." (60.)

Moreover it is the men in the boat, and not the winchman, who are supposed to watch the waves.

"Q. Have you not stated that it was also your busi- " ness to watch the waves?

"A. Everybody is supposed to do that when it is " rough; everybody is supposed to do that." (52)

Furthermore they are the ones who watch the sling-load of sugar.

"A. There is some one to see that the sling-load is " placed right where they want it in the boat. *We* " *watch it all the time.*" (70.)

On the other hand, the winchman had to watch the boat to see what signals were given; he could not watch the waves. He says, and it is undisputed, "*My time is* " *practically taken up with looking at the men in the* " *boat.*" (*200-201.*)

And Captain Nicholson shows the utter impossibility of this witness going outside of his own line of duty to perform that of others:—

"Q. Do you say with your experience as an officer, " and a master of a vessel for ten years, that you cannot " judge as to the height of these waves as they come in?

"A. That is practically the idea, yes.

"Q. Here is a Portuguese winchman, who sees the " boat, and who sees and knows all that he has to do to " raise or lower the sugar is to move the lever, how is " he to judge of the height of these waves coming in " from time to time?

"A. It may not be necessary.

"THE COURT. Why not?

"A. To begin with, on account of the house that this " Portuguese is in. His vision is shut off, so that he " cannot see the big seas coming in, if he could it would " make him nervous. He can just see the boat at the

" landing and not much else. He would not have the " constitution to stand it. Sometimes I was excited " myself.

"Q. Now, do I understand you to say, if with your " experience of thirty years on the sea, including your " ten years as master of a vessel, if you cannot judge of " the height of these waves, I want to know how this " Portuguese winchman, put in charge of this danger- " ous thing, can judge the height of the waves, and " so protect those men underneath." (169.)

After objection:—

"A. My experience and my knowledge is that this " Portuguese cannot see much more than the boat at " the landing. The arc of his horizon is restricted.

"THE COURT. Then you claim that the winchman " was not to blame for this injury?

"A. Not the injury.

"THE COURT. Who was to blame?

"A. I cannot say anybody was to blame. I don't " think that Keau" (Palapala) "was to blame." (*170.*)

The court may not be inclined to agree with the latter conclusion. The court may believe, after it has reviewed the testimony of the witnesses of the appellee, that there was some neglect on the part of the boatswain or the loaders, in connection with the canvas. It is not necessary, however, to our case that the court should so find, because the record is clearly wanting in any proof of negligence on the part of appellant.

Was the Winchman's House Properly Constructed?

There was a fleeting attempt made by counsel for appellee toward the close of the testimony to show by cross-examination that the winchman's house was not properly constructed, but it came to nothing. It is almost unnecessary to refer to the matter at all; but we will do so very briefly:—

"Q. Could not the winchman see from his position, " into the boat?

"A. He could see.

"THE COURT. He was above them, was he?

"A. Yes, he was away up above.

"THE COURT. On the wharf?

"A. He was further above, he can plainly see from " where he was to the boat." (46.)

"Q. A few minutes ago didn't you say, in answer to " a point-blank question, that this winchman could " clearly see the boat?

"A. He could clearly see the boat, yes, there is no " doubt of his seeing the boat, Judge. He could simply " see the boat taking the sugar. The house is built so " that he cannot see my steamer.

"Q. How does the house face?

"A. He looks straight down. He must stand with " his right hand on the lever looking at them, if he " wants to see.

"Q. So the tower is so built that he must look down?

"A. There are four sides, there is no way he can see.

"THE COURT. Was it so built because it would make " him nervous?

"A. I do not know. I say it would make me nervous " to watch. I watched them and it made me very " nervous.

"THE COURT. And you were staying on the deck of " the ship?

"A. Yes." (*170-171.*)

Westoby testifies:—

"Q. Have you looked out of this winch-house?

"A. Yes.

"Q. You can see the place where the boats come in " and the sea out beyond?

"A. Yes." (180.)

The winchman testifies:—

"Q. While you were in the well of the donkey, you " could see the landing and you could see the waves " coming in?

"A. Sometimes I could not see.

"Q. Why not?

"A. When the waves are close to the boat I cannot " see.

"Q. You can see when the weather is awful rough, " you can see the waves coming in, can't you?

"A. Sometimes I can see, and sometimes I don't. " *My time is practically taken up with looking at the* " *men in the boat.*

"Q. Suppose you look, can you see these waves come " in?

"A. Suppose I look, yes.

"Q. There was nothing to prevent your seeing if you " want to; you can see if you want to.

"A. Yes." (*200-201.*)

It is perfectly clear then: First, that the duty of the winchman was exactly performed. Second, that he was not responsible for the men coming in after the sugar in such rough weather, nor for their failure to go out when the waves came in. Nor again for their failure to look up at a time when they were apparently ready to receive the sugar; or for their failure to order the winchman to raise the sugar until their trouble with the canvas was over. All of those matters were within their judgment and discretion, and not his. They knew what they were doing, and what they were going to do, and how long it would take. He was not in a position to exercise discretion, if he had the right to do so, in fact he had no such right. Third, that the appellant cannot be held liable to the appellee for the consequences arising out of a set of circumstances in their nature so wholly accidental. There is nothing looking like actionable negligence anywhere in the case. There is no charge that this servant was incompetent or unfit to do his duty. The whole assertion is that he committed one unusual and accidental act that involved bad judgment, or else that he failed to do all that a person of extraordinary resources and ability might have accomplished at the time. But we do not understand that this kind of a showing will charge the appellant with damages. We had supposed that it was necessary to bring home some specific, tangible reality, involving a lapse of duty due from the appellant to the appellee; some

failure to employ care in the selection of servants or other instrumentalities, which was necessary to the efficient handling of the sugar. Unquestionably there is no attempt to do this. The only effort that was made was to show, in some vague, indefinite, and shifting way that there was something wrong somewhere.

The truth of the matter is readily discernible. The only errors of judgment and the only carelessness that was displayed was on the part of the men in the boat. The captain of the ship may have erred in sending the boat while the sea continued to be so rough; that would be an error that the appellant would not be held responsible for. The boatswain may have erred in going in too soon for cargo—the appellant could not be held responsible for that. The loaders may have been in fault in having gotten their canvas under the first sling-load of sugar by mistake; surely the appellant would not be held responsible for that. They may have been in fault in seeking to pull the canvas out while the boat was under the sling-load of sugar. But for such lack of judgment they alone are responsible. The boatswain may have been at fault for not having noticed the situation of the loaders who were immediately before him. But here, again, the appellant is not responsible. It had no control over the actions and discretion of the boatswain. He took no orders from the winchman or anyone else connected with the plantation. He gave orders rather than received them.

In any event whatever may have been the cause of

the accident, it is perfectly clear that it was due to some error or neglect on the part of some one connected with the boat and not the shore. We confidently believe that the appellant will not be held liable for the unfortunate event.

II.

WAS THE ACCIDENT, IN FACT, CAUSED BY THE NEGLIGENCE OF THE APPELLEE AND HIS FELLOW SERVANTS?

This matter has been gone over to a considerable extent necessarily, in the previous discussion, and it would be a burden upon the court for us to repeat what we have already said. Nevertheless, we feel that it is our duty to briefly but forcibly call the court's attention to that evidence which charges the appellee and his fellow servants with a failure to exercise the reasonable care and caution which ought to have been exercised by them that day.

Brief Recapitulation of Evidence.

The court will remember that by the undisputed evidence the sea was very rough in the morning; that the captain of the ship left Paauhau shortly after four o'clock and went to Wookala, and finding it too rough to work there returned again to Paauhau. (*156.*)

The court will also remember that the coast was very abrupt and rocky (*155*), and always dangerous. (*167.*) At such a place, with the waves dashing against the

rocks (*172*), was it not a reckless proceeding for the captain to have sent the boat to the dock for sugar? (62.)

It must be remembered that the men tried for three successive times to get this particular sling-load of sugar "going in and out," because of the condition of the sea, and that the captain kept them there in spite of the fact that the waves made him nervous as he watched the men working in the boat (*171*) although he was at the time 150 yards away, sitting on the steamer's deck (*171*). No wonder, then, that he himself, who was, perhaps, primarily responsible for the accident, said when asked who was to blame: "I cannot say anybody was to blame." (*170.*)

But this is not the only lack of prudence disclosed by the record. Kia, the boatswain, was clearly imprudent. "The crew took orders from him" (96); he stood in the stern, steering the boat. (51.) The sling-load of sugar was suspended between him and the rowers in the forward end of the boat, and between Palapala on the one side and Samoa on the other. (57, 105.)

It was his duty to give orders to the winchman to raise or lower the sugar. (44, 50.) Now, although occupying such an advantageous position from which he could clearly see all that was before him, he, and all the persons in the boat, failed utterly either to warn the loaders or to signal by hand or mouth to the winchman to raise the sugar.

"Q. You all kept still, did you?

"A. We were doing our work; we didn't say anything " at all.

"Q. You are sure that from the time that Palapala " and Samoa were taking out this canvas from the first " sling-load of sugar until the second sling was hoisted " up by the winchman that no one in the boat called " out.

"A. Nobody called out.

"Q. You mean to say that there was no expression, " no shouting?

"A. No, nobody gave any signal when it was lowered " down or when it was hoisted up again.

"Q. You say there was no shouting being done by " the crew of the boat from the time of getting this " canvas from under the first sling-load until the sugar " was hoisted up again?

"A. No one said a word.

"Q. I am not referring to signals, shouting of any " kind?

"A. No one called out." (58-59.)

It may be that the proximate cause of the injury was his negligence, his lack of ordinary prudence in failing to give an order to the winchman to raise the sugar or to the rowers to pull out while the canvas was being fixed. Or, on the other hand, the loaders themselves may have been to blame. There is certainly enough in the evidence for the appellee to charge them with fault; for it appears that it was their duty to watch the sugar all the time. (70.) That it was their duty to receive the sugar as soon as it came close enough to them to guide it and

trim it to the proper position in the boat (106); that it was their duty to look to the sling-load of sugar and put it in the proper place; to get hold of it when it was right above their heads, and set it in place. (49, 50.)

In this behalf Samoa testifies:—

"Q. What were you doing?

"A. I and Palapala were the ones to receive the "sugar.

"THE COURT. You were to receive the sugar when it "came down in the sling?

"A. Yes.

"Q. You mean when it came down where you could "reach it?

"A. Yes.

"Q. I mean it was over your heads when you held up "your hands to receive it?

"A. Yes, when it was time for us to get hold of it, "when the sling is being lowered, then we set it in "place." (91.)

He also testifies that it was so suspended and in place when the accident occurred, and that the only reason that they did not receive it was because they were working on the canvas. (94, 95.)

Now, if the sugar was placed and held exactly in the right position, and the sea was comparatively smooth at the time, subject, however, to the constant danger of a blind roller coming in, ought they not, if they were not immediately ready to receive the sugar, to have asked the boatswain to notify the winchman to

raise it, or to direct the oarsmen to row out to a place of safety until the trouble with the canvas was over? This leads us to the last subdivision of this part of the argument, namely,

The Trouble with the Canvas.

By the testimony of all of the witnesses for the appellee the accident was caused by some trouble with the canvas. They had put one sling-load of sugar in the boat. It was laid lengthwise (69) on the left side. (92.) This second sling-load was to have been laid alongside of it on the right side. The boat carries two canvases, one on the right and the other on the left; the object being to have each sling-load of sugar covered. But, "through some mistake," the second canvas or tarpaulin was caught by the first sling-load, and the two loaders were engaged in getting the second tarpaulin free, when the appellee came in contact with the sugar. This statement is taken from the testimony of the appellee himself, and will be found at page 129 of the record.

He also says that at that time the boat was not very steady; it was going forward and back through the action of the waves. His fellow loader, however, did not agree with him on this particular point. He says that the boat was steady. (94.)

Now with the boat free upon the water, and the sling-load of sugar weighing half a ton suspended over it in the exact position for lowering, and everything in ap-

parent readiness for the "lowering altogether," these two men, without any notice as to what they were going to do, or how long it would take, given either to the boatswain or to the winchman, stooped down, and continued thus until suddenly, by the action of the waves, one of them was brought in contact with the mass of sugar suspended over them, and the question is, were they neglectful?

It would seem that if this statement is correct, there can be no doubt of it. That it is correct is amply shown by the testimony already given, taken in connection with what follows.

We now quote: Hina says, "The canvas cover had gotten under the first sling-load of sugar, they were trying to get it from under to put over the side of the boat." He then testifies that Palapala had no warning at all from anyone. Showing, first, that he was in need of warning, and, second, that his fellow-servants failed to give him any. Hina also testifies that Palapala had just pulled up this cover, and had commenced to stand up when he was struck by the sling-load of sugar. And here it may be noted that the witness does not say "when he was crushed by the sling-load of sugar," or "when the sling-load of sugar fell upon him," but "when he was struck," indicating not a lowering of the sugar, but a contact with it. (54-55.)

The picture is quite clear then. This man was stooping over looking down at a time when he ought not to have been. He was inattentive, probably because of his confidence in the apparent calmness of the sea, with

whose action he felt familiar. He rises thoughtlessly, and before he or anyone else realizes how stealthily the waters have come in, he is forced against the weight above him, and the accident has occurred.

Kewiki says that Palapala was standing in no particular place, he was always "*here and there in the boat,*" (68) indicating that the winchman could not know what he was going to do next,—he was in this position one minute, he would not be there the next. The winchman could not raise and lower the sugar to suit the movements of this man who was skipping about the boat, now working down, now working up, now forward, now aft. His duty was to keep the sugar in place. Palapala looked out for himself.

Kewiki is asked the question, "Now, at the time of " the accident, which way was he facing, towards the " landing or towards the inside of the boat?

"A. He was not facing either way, he was fixing the " canvas which was under the sling-load of sugar.

"Q. You mean he was looking into the bottom of the " boat fixing the canvas?

"A. Yes." (68-69.)

Samoa testifies:—

"We were trying to get the canvas from under the " first sling-load of sugar, and we were looking at that." * * * "We were standing upright then, trying to " pull the canvas out from under the first sling-load of " sugar when Palapala was struck." * * * "I was " standing up, but the work is down, so I had to look " down.

"Q. Palapala and you were engaged at the same "work at that time?

"A. Yes." (93.)

Kia says, that they were stooping down to get this canvas from under the sling. (103.)

Palapala says: "I was stooping down fixing the can- "vas to put it to the side of the boat. When I stood up "the sling-load struck me." (128.)

Thus all of the witnesses for the appellee testify that the appellee was looking down working on the canvas when the accident occurred. It is also clear that from their failure to call his attention to his danger, although they all saw him and knew that the sugar was suspended over him, they relied implicitly upon his ability to take care of himself. It is also clear that it was his failure to do so that caused the accident. He took a chance and it went against him, and while we may not believe that he was recklessly negligent, he certainly was not using the due care and caution which the situation required. In any event he is certainly more at fault than was the winchman, who, like the members of the crew of the boat, readily believed that as long as he performed his duty, Palapala would look out for himself.

III.

WE BELIEVE WE HAVE DEMONSTRATED THAT THERE WAS NO SHOWING OF NEGLIGENCE ON THE PART OF THE APPELLANT, BUT EVEN IF NEGLIGENCE HAD BEEN SHOWN THE DAMAGES AWARDED WERE CLEARLY EXCESSIVE. MOREOVER, THE TESTIMONY WAS OF SUCH A NATURE THAT THE COURT OUGHT NOT TO HAVE ATTEMPTED TO BASE AN AWARD UPON IT. WE BELIEVE THAT THIS COURT WILL FIND, IF IT EVER REACHES THE INQUIRY AT ALL, THAT FURTHER TESTIMONY MUST BE TAKEN BEFORE IT CAN KNOW THE REAL EXTENT OF THE INJURY SUSTAINED BY THE APPELLEE.

The record shows nothing more than an ordinary breaking of the collar bone, with a little bruise about it. The appellee testifies in answer to the question, "What was the effect of the blow?":—

"A. I was hurt, I felt as if I was out of breath." * * * "My feeling at that time was that I had "fallen."

"Q. Were one of your bones broken?

"A. Yes.

"Q. What bone?

"A. Collar bone.

"Q. What, if anything, was the effect of this blow or " you? Pain in any way? Physical pain?

"A. Well, when I was brought back to Honolulu I " was taken to the Queen's Hospital. The collar bone " had been paining me and I had pains in the shoulder. " This does not pain me all the time; some days I am " all right and sometimes it pains me off and on." (116.)

* * * *

"Q. Will you describe that pain?

"A. I did feel the pain at that time."

* * * *

"Q. This pain you say you felt when you went to " the captain's room on board the ship, did that pain " affect you in any way?

"A. It did not." (117.)

The witness having testified that it had no ill effect, counsel repeated his question, presumably with emphasis:—

"Q. What other effect, if any, did this pain you " speak of in your shoulder—what other effect did it " have upon you?

"A. My body all over was in pain.

"Q. How was it at night?

"A. At night time it pained me so that I could not " sleep.

"THE COURT. Not now?

"A. No, not at the present time, but I still have pain " in my shoulder.

"THE COURT. Right after the injury did it pain you " at night?

"A. Yes.

"Q. How long after you arrived at the Queen's Hos-
" pital did these pains continue?

"A. About three weeks after I arrived at the hospital
" my pain kind of eased off—pain in the collar bone.

"Q. Then after that time you experienced no other
" pain?

"A. I have had pain in my shoulder, not continual
" pain, but at times off and on.

"Q. How long after the first pain was it when the
" second pain started in your shoulder?

"A. I think a week after the pain went away from
" the broken collar bone that pain appeared in my
" shoulder." (118.)

He adds that sometimes when walking in the street and shifting his hand "when I jerked it" a pain started, and sometimes that it would pain all day and night and the next day, and then the pain would leave him. (118-119.)

This is the substance of his testimony, on the direct, and shows, we submit, nothing more than a simple fracture of the collar bone, with the attendant knitting pains, which he does not say were severe, or of any unusual character.

He testifies on cross-examination that a new bandage was put on at the Queen's Hospital, and that both the bandages together were on for a period of three weeks, when they were taken off. The accident occurred on the 19th of March, and the witness was on the stand

testifying on the 8th of May, being seven weeks after the accident occurred.

It would be perfectly natural that there should be temporary pains lasting awhile and going away again at such times as he jerked his arm that soon after the fracture. There was nothing in this testimony to indicate anything approaching complication, and nothing to show that it was anything more than a simple fracture of the collar bone.

The next witness was a doctor, one F. H. Humphris, who testified that he had made an examination, "As " thorough as I thought necessary." He said, after the injury had been described to him, when asked in regard to the pain, "The pain will be severe probably"; after which all the rest of his testimony is negative. He does not say that, in his judgment, the conditions indicate neuralgia or tubercular joint. He simply says that it *might be* the beginning of a tubercular joint; it *might be* neuralgia of the joint.

"Of course if it were tubercular it *might mean* his " losing the arm, his losing the shoulder joint, and even " the loss of his life!" In other words, it might mean anything that the imagination could picture. But judgments are not passed on such imaginings. It requires something more than a "might be" to sustain a verdict for a large amount of damage.

Now it appears that on the following day something peculiar appeared in the condition of the appellee, which this doctor did not at the time understand, and upon which he does not say anything serious has oc-

curred, but he goes on saying it *might* occur. This is the whole substance of his testimony, and he was the only professional man called for the appellee.

Now since the trial there have been filed affidavits showing by the positive testimony of disinterested witnesses, that the appellee has been able to perform all ordinary duties, as well as to enjoy healthy and manly sports; in other words, he can now do anything and everything that a wholly sound man might wish to do. He has worked as a stevedore at two dollars a day, seventy-five cents more than he received as a sailor; he has worked thus repeatedly since the trial. And for five days in the month of August he worked scraping the hull of the "Kinau," and has sought regular employment as a sailor, representing that he was fit to perform said services. He has also played baseball, using both arms and hands, pitching, fielding, and catching in said game. These facts are set forth in detail in the affidavits filed in support of the motion for leave to take and introduce new evidence, now pending and undecided in this court. They are of such a nature as to remove all doubt as to the physical condition of the appellee, which on the last day of the trial was apparently such as to render uncertain the exact effect of his injuries.

There is also attached to the motion, and made a part thereof, the affidavit of Doctor Wood, a physician and surgeon of Honolulu, who says upon the additional testimony contained in the foregoing affidavits, that it is his opinion that the condition of the appellee on the last

day of the trial was caused, not by his injuries, but by a probable attack of dengue fever, which was at the time epidemic in Honolulu.

It is true that some of the facts stated in the affidavits filed by the appellant in support of its said motion are denied in affidavits filed by the appellee. But there is apparent inconsistency in the tenor of the two affidavits filed by the appellee.

In the appellee's affidavit of the 6th of October, 1903, he says that he tried to do some work on July 27, 1903, and on or about September 14, 1903; he then says:—

"These two occasions represent the sum total of my "attempts at stevedoring; between them, I made no "attempt at such work, and since the second occasion I "have not attempted any. On neither of these occasions "did I attempt anything arduous or laborious, either "in itself, or as compared with the duties of my calling "as a sailor. In his affidavit Fern says that my earning "capacity since July 27th has been equal to my earning "capacity prior to March 19th, 1903; but the facts "are that prior to March 19th, 1903, my earning capaci-"ty produced $7.50 per week and my board, whereas, "my attempts at work on the two occasions referred to, "they constituting the whole of the stevedoring that "Fern seeks to make so much of, has produced the "total sum of $4.00, and no more."

It will be seen that the attempt is made to throw out an inference that all the work done by the appellee during the time referred to was the two days for which he received $4.00.

Now in the affidavit of Fern, subscribed to on the

23d of October, 1903, attached to the motion filed by the appellant in this court, are the following specific allegations:—

"That on the 27th day of July, 1903, the said Palapala applied to deponent for work as a stevedore, and then represented to deponent that he had completely recovered from his injury sustained on the said 19th day of March, and thereupon deponent gave him employment as a stevedore, and said Palapala worked at such employment for the said corporation on July 27th, August 3d, 7th, and 8th, 1903; that from the tenth to the fifteenth of August, 1903, inclusive, the said steamship 'Kinau' was placed and remained upon the dry dock in Honolulu for a general overhauling, and during such period the said Palapala was daily employed with others in cleaning (chiseling off rust, etc.) and repainting the hull of said steamer; that the said Palapala was employed as a stevedore on the 18th day of August, 1903, on the said steamship 'Maue,' and on August 25th, 1903, on the said steamships 'Helene' and 'Maui,' working not only during the regular hours of labor but also overtime, and that on September 10th, 21st, 22d, and October 8th, 1903, he worked as a stevedore on the said steamship 'Helene.'

* * * *

"That the said Palapala has on several occasions since the 27th day of July, A. D. 1903, requested deponent to give him regular employment as a sailor, that deponent has hitherto been unable to provide the said Palapala with such employment on the vessel on which he desires work;

"That on several occasions since the 8th day of Oc-
" tober, A. D. 1903, the said Palapala has been offered
" work as a stevedore by deponent, but the said Palapala
" has since said date refused to work;

"That deponent about three weeks ago organized a
" baseball team from among the sailors and stevedores
" employed on Inter Island steamships, and the said
" Palapala has regularly up to the 19th day of October,
" 1903, practiced daily with the said team during the
" noon hour and between the hours of five and six P. M.,
" the usual practice hours, and has used both arms and
" both hands in pitching, fielding and catching in the
" said game;

" That the work of stevedore, including the loading
" and discharging of ships, in which the said Palapala
" has been engaged for the said corporation since the
" 27th day of July, 1903, as aforesaid, is of an arduous
" and laborious nature, requiring considerable physical
" strength and endurance; that said deponent has seen
" the said Palapala during his employment since July
" 27th, 1903, as aforesaid, lifting and carrying heavy
" weights, weighing 125 pounds and upward, apparent-
" ly as easily as he has ever done prior to the 19th day
" of March, 1903;

"That the deponent knows that the said Palapala is
" in sound physical condition and is competent physical-
" ly to work as he was prior to the 19th day of March,
" 1903;

"That said Palapala has since the 27th day of July,
" 1903, worked the full working day of nine hours when
" employed as a stevedore as aforesaid, and has received
" as wages the sum of $2 per day and 50 cents per hour
" for over time for such work."

The above allegations are also supported by the affidavit of M. G. K. Hopkins, also an employee of the Wilder Steamship Company.

Now in the affidavit of the appellee, subscribed to on the 27th day of October, 1903, he makes no answer to the first specific allegations quoted above, and admits that he did the scraping on the "Kinau," and merely seeks to explain his evasion of the subject in his former affidavit. With reference to the ball games, he says: " Fern's reference to the baseball game I am compelled " to pronounce a gross exaggeration."

Following which he denies specifically having played at the game as a member of the team, although he admits that he was there looking on and tossed the ball back at times when it came near him.

The affidavits in connection with the court's knowledge of such matters demonstrate one thing, and that is, that upon depositions, where examination and cross-examination can be had, satisfactory proof can now be taken as to the true effect of the injuries the appellee received, and that is all that we ask to have done in the event that the court reaches the inquiry at all.

We will not take up the time of the court by repeating the argument, or renewing the citations that have already been presented in a former brief filed herein, to the effect that the judgment of the trial court was greatly in excess of judgments usually given for such injuries as the appellee received. We do not believe that this court will ever consider this question at all.

We most confidently believe that the court will find that there was no negligence on the part of the appellant, and that the appellee himself, together with his fellow servants, was at fault. But if the court should not agree with us, we do not see how it is possible on the evidence adduced in the court below to arrive at any satisfactory and intelligent answer, as to what award should be made to the appellee for damages sustained, and, therefore, it becomes absolutely necessary, if the inquiry is reached at all, to issue an order for the taking of depositions, which will exclude all speculation, and reduce the inquiry to the field of certainty, and place the court in possession of facts, instead of surmises.

Reference to the Opinion of the Trial Judge, and Conclusion of Argument.

We have not heretofore referred to the attitude of the trial judge, nor to his opinion filed herein. We have been impressed, on examination of the record, with the conviction that the trial judge was greatly affected by the fact that the appellee was hurt, and that his sympathies were keenly aroused in his favor.

The opinion, on the other hand, shows clearly that he was greatly in doubt as to all the issues, but chose to resolve them in favor of the appellee.

After stating the claim of the libelant to the effect that the winchman neglectfully and without warning " let go of the sling-load of sugar before the crew in the " boat were given the signal," and the claim of the re-

spondent that the sugar was suspended over the water and not lowered by the winchman, the court puts the following question:—

"Was the accident the result of the negligence of the "winchman in letting go the sling-load of sugar without "notice from the crew in the boat, or was it the result "of a big wave which thrust the boat up towards the "suspended sling-load of sugar and thus caused the "injury to the libelant?" (237-238.)

The opinion proceeds:—

"It was the custom, as shown by the uncontradicted "evidence in this case, for the man in charge of the "winch on the wharf at Paauhau, to suspend the sling-"load of sugar over the boat which was to receive it, "and hold it there until he got a signal from the crew "in the boat that they were ready for the sugar, when "he slowly lowered it into the boat, two of the crew "usually 'trimming' it in the technical language used, "or steadying it gradually into place. (238.) * * *

"That the business of transferring sugar from the "landing at Paauhau to vessels lying out in the open "sea is a dangerous one, because of the methods em-"ployed and the conditions surrounding the transac-"tion, is clear; and especially is this so when the weather "is stormy and the sea consequently rough, rendering "more than usual care necessary in the handling of the "instrumentalities employed." (238.)

Whereupon the court refers to some of the evidence as to the condition of the sea, and seems to arrive at the conclusion that it was comparatively smooth, which we submit was erroneous; but even were it otherwise, it

would not affect the real question to be determined, which was not as to the general condition of the sea, but whether a "blind roller" rose unexpectedly at a time when the loaders were taking an unwarranted chance in looking down when they ought to have been looking up, or in remaining under the suspended sling-load of sugar when they ought either to have had it raised, or else have had the boat rowed to a place of safety.

The court having referred with approval to the act of the winchman raising the sugar immediately upon the injury occurring, and to the conflict in the testimony, of the witnesses for the appellant and the appellee, as to whether the appellee had risen and stretched forth his hands at the time of the accident, as testified to by the witnesses for the appellant, or had merely straightened up, as testified to by the witnesses for the appellee, declares its belief in the theory advanced by the witnesses for the appellee, and concludes that in its opinion "the " injury was not caused by the boat being raised up on " a big wave, but that it resulted from the careless and " negligent act of the winchman in suddenly lowering " the sling-load of sugar without warning, and before " any signal had been given from the man in the boat." (246.)

The court grounds its opinion upon a belief that the sugar fell upon the appellee, rather than that he was struck by contact with it. In other words, the opinion will be found to rest upon a lowering down rather than a striking. (See 244.) But, we submit, this conclusion is not supported by the record.

Hina says:

"It *struck* him right on the breast." (45.)

"Q. Up to the time it *struck* you heard no warning "either by members of the crew of the boat or by the "winchman?

"A. None at all." (54-55.)

"Q. Who was commencing to rise?

"A. Palapala. He had just pulled up this cover just "lying alongside and commenced to stand up when "he was *struck* by this sling-load of sugar.

"Q. Where did you say he was *struck*?

"A. Right on the breast here. (Indicating.)

"Q. After he had been *struck,* what was the next "thing done?

"A. The Portuguese, the winchman, he hoisted it up "again and Bob got hold of Palapala." (55.)

On page 56 there is a single exception; the witness makes a statement to the effect that the sling-load fell on him on the edge of the boat, but this is immediately followed by testimony which is wholly inconsistent with the possibility of such a falling:

"Q. Is it not a fact that he was in the boat, and that "he was knocked with his back on the edge of the boat?

"A. Yes, that is the time that he was knocked down "with the sling-load of sugar. He was knocked down "on to the edge of the boat and then fell into the boat." (56.)

Moreover, as heretofore pointed out, a falling mass like half a ton of sugar would not strike a man on the

breast, especially if he was stooping over. It would strike him on the head, back or shoulder. This, to us, is one of the strongest reasons for asserting that the witnesses for appellant were right when they say that the appellee was thrust upward against the sugar at a time when he was just in the act of stretching out his hands.

Again, Hina testified, when asked what cry that was Palapala gave:

"Q. What did he say?

"A. Just *when he was struck* the *force*" (not the weight) "of the sling-load made him give a kind of a "grunt." (60.)

This again indicates a swinging blow, and not a falling down. So, too, counsel for appellee never assumes a falling, always assumes a striking. We quote:—

"Q. I will ask you whether you saw the sugar at the "time that it struck Sam?" (63.)

"Q. Now, when this sugar struck the libelant, what "became of the sugar?" (64.)

"Q. Between the point of time, when the sugar "struck Palapala, etc." (65.)

"Q. How soon after the sling-load of sugar struck "Palapala was it that the winchman hoisted it up?" (65.)

"Q. Give your best recollection as to the interval between the time the sling-load struck him, etc.," (65.)

All of these questions, and many others, indicate that counsel for appellee understood there was a striking,

and not a falling. So, too, the witness Kewiki distinctly disclaims a falling. He says: "He was struck by the "sling-load, then he fell into the boat and laid there "as if he was dead." Indicating a striking of the sugar and a falling of the man.

It hardly seems right to refer to the testimony of the other witnesses for the appellee, for each of them disclaims having seen the sugar at the time of the accident. For instance Samoa says:—

"THE COURT. And you did n't see it coming down "until it struck Palapala?

"A. We did not know it until Palapala was struck." (92.)

"Q. How was it that you did not see the sling-load "until it struck Palapala?

"A. I was busy at my work." (93.)

Kia says:—

"Q. Did I understand you to say that you did not "see the sugar descend until it actually struck Pala-"pala?

"A. No.

"Q. Is that right?

"A. Yes, it is." (105.)

Palapala testifies that he was struck, not crushed, "*struck* right in front here." A singular place, as we have repeatedly said, for a falling load to come in contact with a man. But later he too, it will be remembered, disclaims having seen the sugar moving at the time it struck him. (127.)

The witnesses for appellant, it will be remembered, positively deny that the sugar was lowered. Now, taking all this testimony together, we submit that it is impossible to find that the plaintiff has maintained the burden of showing that there was a falling or lowering of the sugar at the time of the accident, and therefore, that the trial court was mistaken in its conclusion that there was negligence shown on the part of the appellant.

We also submit, with all due deference, that the trial court was clearly wrong in making an award without further light; and we earnestly ask this court, if it shall not agree with us upon the question of negligence, to permit us to show the actual extent of the injuries sustained by the appellee, as we can now do, as sufficient time has elapsed since the injury was sustained, it now being about ten months since the accident occurred, while the trial took place within seven weeks.

We trust and believe, however, that this will not be necessary, as we are very confident that this court will exonerate the appellant and will find that it exercised all proper care at the time of the accident.

Respectfully submitted,

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MORRISON & COPE,
Proctors for Appellant.

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